Public Prosecutor v Mohamad Alraziq bin Ramli (No 2)

HIGH COURT (KUALA LUMPUR) — CASE NO WA-45–13–10 OF 2020
ASLAM ZAINUDDIN JC
25 AUGUST 2021

Criminal Procedure — Appeal — Notice of appeal — Prosecution lodged appeal out of time by two weeks — Whether prosecution entitled to file appeal out of time by relying on direction issued by Chief Justice

The accused was charged for two offences, the first offence under s 39B of the Dangerous Drugs Act 1952 ('the DDA') and the second offence under s 3(1)(a) of the Dangerous Drugs Act (Forfeiture of Property) Act 1988. On 12 July 2021, the accused was acquitted and discharged on the second charge before proceeding to hear the defence case on the first charge which was reduced to s 39A(2) read together with s 6 of the DDA. The deputy public prosecutor lodged an appeal against the High Court's decision only on 13 August 2021, two weeks out of time. The issue for determination of the court as whether the prosecution was entitled to file an appeal out of time by relying on a direction issued by the Chief Justice. The public prosecutor referred to paras 4 and 5(b) of the Chief Justice's Direction No 8 of 2021 ('Arahan Ketua Hakim Negara Bil 8 Tahun 2021') dated 31 May 2021 to justify the late filing of the notice of appeal.

Held, setting aside the notice of appeal:

(1) It was trite that an appeal from a decision of the High Court in a criminal matter is a statutory right provided in s 51 of the Courts of Judicature Act 1964 ('the CJA'). The CJA is a statute and not a piece of subsidiary legislation like the Rules of Court 2012. When s 17(8) of the CJA referred to 'rules of court', it could only mean subsidiary legislation like the Rules of Court 2012 and not the CJA. To read the said provision otherwise would result in provisions of statutes being amended by a mere stroke of the pen and ignoring the provisions of art 66 of the Federal Constitution on the legislative power of Parliament. It could not be the intention of the August House when it passed the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 ('the Covid-19 Act'). It was a well settled principle that a practice direction could not override a statutory provision. The prosecution's reliance on the said direction by the Chief Justice to justify the delayed lodging of the appeal was misplaced (see paras 8–9).

[Bahasa Malaysia summary

Tertuduh telah dipertuduh atas dua kesalahan, kesalahan pertama di bawah s 39B Akta Dadah Berbahaya 1952 ('ADB') dan kesalahan kedua di bawah s 3(1)(a) Akta Dadah Berbahaya (Perlucuthakan Harta) 1988. Pada 12 Julai 2021, tertuduh dilepaskan dan dibebaskan atas pertuduhan kedua sebelum meneruskan untuk mendengar kes pembelaan atas pertuduhan pertama yang dikurangkan menjadi s 39A(2) dibaca bersama s 6 ADB. Timbalan pendakwa raya mengemukakan rayuan terhadap keputusan Mahkamah Tinggi pada 13 Ogos 2021, dua minggu di luar waktu. Isu untuk ditentukan mahkamah adalah sama ada pendakwaan berhak untuk memfailkan rayuan luar pada waktunya dengan bergantung pada arahan yang dikeluarkan oleh Ketua Hakim Negara. Pendakwa raya merujuk kepada perenggan 4 dan 5(b) dari Arahan Ketua Hakim Negara Bil 8 Tahun 2021 bertarikh 31 Mei 2021 untuk memberikan justifikasi pemfailan luar waktu notis rayuan.

Diputuskan, mengetepikan notis rayuan:

(1) Ia adalah jelas bahawa rayuan terhadap keputusan Mahkamah Tinggi dalam perkara jenayah adalah hak undang-undang yang diperuntukkan dalam s 51 Akta Mahkamah Kehakiman 1964 ('AMK'). AMK adalah undang-undang dan bukan sekeping undang-undang subsidiari seperti Kaedah-Kaedah Mahkamah 2012. Apabila s 17(8) AMK merujuk kepada 'kaedah-kaedah mahkamah', ianya hanya bermaksud undang-undang subsidiari Kaedah-Kaedah Mahkamah 2012 dan bukannya AMK. Dengan membaca peruntukan tersebut sebaliknya akan mengakibatkan peruntukan undang-undang dipinda dengan sebegitu mudah dan mengabaikan peruntukan perkara 66 Perlembagaan Persekutuan mengenai kuasa perundangan Parlimen. Ia bukan niat Majlis Ogos apabila ia meluluskan Akta Langkah-Langkah Sementara Bagi Mengurangkan Kesan Penyakit Koronavirus 2019 (COVID-19) 2020 ('Akta Covid-19'). Ini adalah prinsip yang mantap bahawa arahan amalan tidak dapat melangkaui peruntukan undang-undang. Kebergantungan pihak pendakwaan pada arahan Ketua Hakim Negara tersebut bagi memberikan justifikasi kelewatan pemfailan rayuan tersebut adalah satu salah arah (lihat perenggan 8–9).]

Cases referred to

Lorraine Phylis Cohen & Anor v PP [1989] 2 MLJ 288; [1989] 1 CLJ Rep 84, SC (refd)

Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385, FC (refd)

Nathan v PP [1972] 2 MLJ 101; [1972] 1 LNS 99 (refd)

PP v Mohamad Alraziq bin Ramli [2021] MLJU 893; [2021] 1 LNS 726, HC (refd)

Zaidi bin Mohdzain & Anor v PP [2021] MLJU 722; [2021] 6 CLJ 905, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 17(8), 51, 56
Dangerous Drugs Act (Forfeiture of Property) Act 1988 s 3(1)(a)
Dangerous Drugs Act 1952 ss 6, 39A(2), 39B
Federal Constitution art 66
Rules of Court 2012
Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 s 50

Izalina bt Abdullah (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Hanif bin Hashim (Hanif & Co) for the respondent.

Aslam Zainuddin JC:

CAN THE PROSECUTION IN A CRIMINAL CASE FILE AN APPEAL OUT OF TIME BY RELYING ON A DIRECTION ISSUED BY THE RIGHT HONOURABLE CHIEF JUSTICE?

[1] In this case the accused was charged for two offences, the first offence under s 39B of the Dangerous Drugs Act 1952 ('the DDA') and the second offence under s 3(1)(a) of the Dangerous Drugs Act (Forfeiture of Property) Act 1988. On the *12 July 2021*, I acquitted and discharged the accused on the second charge before proceeding to hear the defence case on the first charge which I had reduced to s 39A(2) read together with s 6 of the DDA. The deputy public prosecutor ('DPP') being dissatisfied lodged an appeal against my decision only on the *13 August 2021*. For the purposes of this judgment we are only concerned with the second charge. At the time of releasing this judgment, the case against the accused on the first charge is still ongoing at the defence stage. To know what happened earlier in this case, see *Public Prosecutor v Mohamad Alraziq bin Ramli* [2021] MLJU 893; [2021] 1 LNS 726.

[2] The second charge against the accused is as follows:

> Bahawa kamu, pada 26 Mac 2019 jam lebih kurang 10.15 malam, di tepi jalan kawasan belakang pusat membeli belah 'Quill City Mall', Jalan Sultan Ismail, dalam daerah Dang Wangi, dalam Wilayah Persekutuan Kuala Lumpur, didapati telah menggunakan harta iaitu sebuah kenderaan bermotor jenis Mitsubishi Lancer warna maroon No pendaftaran WTF 1013 dengan niat hendak menjalankan perbuatan aktiviti pengedaran dadah berbahaya yang menjadi satu kesalahan terjadual di bawah Akta Dadah Berbahaya (Perlucuthakan Harta) 1988. Oleh yang demikian, kamu telah melakukan suatu kesalahan di bawahs 3(1)(a) Akta itu dan boleh dihukum di bawah seksyen yang sama.

[3] In this judgment I will not go into the merits of the case lest it be said later on appeal after the end of the defence case for the first charge that I have written two judgments in this case, see the Supreme Court case of *Lorraine Phylis Cohen & Anor v Public Prosecutor* [1989] 2 MLJ 288; [1989] 1 CLJ Rep 84 and the case of *Nathan v Public Prosecutor* [1972] 2 MLJ 101; [1972] 1 LNS 99, rather I will only touch on the issue whether this appeal has been lodged within the time prescribed by law or not, *id est* whether this appeal is competent or not, and I proceed to do so as follows.

THE LAW

[4] In the Courts of Judicature Act 1964 (Act 91) ('the CJA') it is provided in s 51 that:

> 51 Notice of appeal
>
> (1) Every appeal shall be by notice in writing which shall be filed with the registrar of the court from which the appeal lies at the place where the decision appealed against was given within *fourteen days* after the date of the decision.

[5] It is to be noted that my decision was delivered on *12 July 2021* and the appeal was lodged on *13 August 2021*, therefore on first blush it is obvious that the appeal seems to be out of time by two weeks. But interestingly the public prosecutor referred to paras 4 and 5(b) of *Arahan Ketua Hakim Negara Bil 8 Tahun 2021 (Chief Justice's Direction No 8 of 2021)* dated 31 May 2021 to justify their late filing of the notice of appeal. Now what does the said Arahan say?

> ARAHAN KETUA HAKIM NEGARA
>
> BILANGAN 8 TAHUN 2021
>
> PENGECUALIAN TERHADAP PEMAKAIAN PERUNTUKAN UNDANG-UNDANG BERHUBUNG DENGAN URUSAN MAHKAMAH DI SELURUH MALAYSIA
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> PADA menjalankan kuasa yang diberikan oleh s 16A Akta Mahkamah Kehakiman 1964 (Akta 91), sub-s 17(8) Akta 91, s 3A Akta Mahkamah Rendah 1948 (Akta 92) dan sub-s 3(7) Akta Kaedah-Kaedah Mahkamah Rendah 1955 (Akta 55) yang diubah suai melalui Akta Langkah-Langkah Sementara bagi Mengurangkan Kesan Penyakit Koronavirus 2019 (Akta 829), demi kepentingan pelaksanaan keadilan, kesejahteraan awam, keselamatan awam, kesihatan atau kesusilaan awam, saya mengeluarkan Arahan ini bagi memperuntukkan pengecualian terhadap pemakaian peruntukan undang-undang berhubung dengan urusan mahkamah di seluruh Malaysia seperti yang berikut:
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> ...
>
> PENGECUALIAN TERHADAP PEMAKAIAN PERUNTUKAN UNDANG-UNDANG BERHUBUNG DENGAN URUSAN MAHKAMAH
>
> A. Pengecualian Terhadap Pematuhan Kehendak Tempoh Masa

4. Pihak-pihak adalah dikecualikan daripada mematuhi kehendak tempoh masa sebagaimana yang diperuntukkan di bawah undang-undang berhubung dengan urusan mahkamah di seluruh Malaysia dan bagi maksud ini, pihak-pihak tidak perlu memohon bagi mendapatkan perintah untuk pelanjutan masa daripada mahkamah.

5. Pengecualian daripada pematuhan kehendak tempoh masa adalah merangkumi hal perkara yang berikut:

(a) ...

(b) pemfailan notis rayuan;

(c) ...

(d) ...

(e) ...

(f) ...

[6] On the 13 of July 2021 an amendment to the above direction was issued and the relevant part is as follows:

(c) walau apa pun yang diperuntukkan dalam Arahan Ketua Hakim Negara Bilangan 8 Tahun 2021, mahkamah mempunyai budi bicara untuk memutuskan mengenai pemakaian Arahan tersebut tertakluk kepada arahan yang dikeluarkan oleh kerajaan dari semasa ke semasa berkaitan dengan kawalan pergerakan termasuk pengoperasian firma guaman, perkhidmatan pesuruhjaya sumpah, mobiliti pihak-pihak dan apa-apa sebab lain yang difikirkan wajar oleh mahkamah.

[7] The above Arahan gets its authority or in Bahasa Melayu 'punca kuasa' from s 50 of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 (Act 829) which is as follows:

Section 50

The Courts of Judicature Act 1964 is modified by inserting after s 16 the following section:

16A General power of the Chief Justice to issue direction

The Chief Justice may, if the Chief Justice is of the opinion that the circumstances warrant and it is necessary in the interest of the dispensation of justice, public safety, public security, public health or propriety or for other sufficient reason to do so, *issue any direction relating to the business of the court as may be necessary.*

Section 51

The Courts of Judicature Act 1964 is modified in s 17 —

(a) ...

(b) ...

(c) by inserting after sub-s (7) the following subsection:

(8) The Chief Justice may, if the Chief Justice is of the opinion that the circumstances warrant and it is necessary in the interest of the dispensation of justice, public safety, public security, public health or propriety or for other sufficient reason to do so, *modify any provision of the rules of court or suspend the application of such rules of court as is necessary for doing complete justice* in any cause or matter pending before the courts and to ensure that the administration of justice is carried out.

[8] Ergo this raises the question whether the said Arahan can be read to include the waiver of the time provided to lodge appeals in criminal cases. In my considered view this cannot be so. It is trite that an appeal from a decision of the High Court in a criminal matter is a statutory right provided in s 51 of the Courts of Judicature Act 1964. The CJA is a statute and not a piece of subsidiary legislation like the Rules of Court 2012. Therefore, when s 17(8) of the CJA refers to 'rules of court', it can only mean subsidiary legislation like the Rules of Court 2012 and not the CJA. To read the said provision otherwise would result in provisions of statutes being amended by a mere stroke of the pen and ignoring the provisions of art 66 of the Federal Constitution on the legislative power of Parliament. This cannot be the intention of the August House when it passed the Covid-19 Act. Furthermore, it is a well settled principle that a practice direction cannot override a statutory provision. See the Federal Court case of *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385and the recent High Court case of *Zaidi bin Mohdzain & Anor v Public Prosecutor* [2021] MLJU 722; [2021] 6 CLJ 905.

[9] Ergo the DPP's reliance on the said *arahan* to justify the delayed lodging of the appeal is misplaced. All is not lost however, as the DPP can still make an application under s 56 of the CJA for an extension of time to lodge the appeal and give reasons for the delay in doing so.

[10] In the event *cadit quaestio*.

Notice of appeal set aside.

Reported by Mohd Kamarul Anwar